

Original filed 2/27/07

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PAUL GILMORE, JR.,)
Petitioner,)
vs.)
JEANNE WOODFORD,)
Respondent.)

No. C 06-3624 JF (PR)

ORDER GRANTING REQUEST
FOR EXTENSION OF TIME;
GRANTING MOTIONS TO
PROCEED IN FORMA
PAUPERIS; ORDER TO SHOW
CAUSE WHY PETITION
SHOULD NOT BE DISMISSED
FOR FAILURE TO EXHAUST
STATE REMEDIES

(Docket Nos. 2, 4, 5)

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the calculation of his custody credits pursuant to his parole revocation. Petitioner has filed a request for extension of time to submit his in forma pauperis application and two motions to proceed in forma pauperis. Petitioner has provided documentation of his attempts to exhaust his claim through the administrative appeal process. However, Petitioner does not state that he presented his claims to the California Supreme Court prior to filing the instant petition. The Court will GRANT Petitioner's request for extension of time (docket no. 4) and GRANT Petitioner's motions to proceed in forma pauperis (docket nos. 2, 5).

1 The Court will order Petitioner to show cause why the petition should not be dismissed
 2 without prejudice because he has not exhausted his state court remedies prior to filing the
 3 instant petition.

4 **STATEMENT**

5 The instant petition was filed on June 8, 2006. Petitioner challenges the California
 6 Parole Board's authority to extend his term of confinement based upon his parole
 7 revocation and the calculation of his custody credits. Petitioner has provided
 8 documentation of his first level of appeal in the prison administrative appeal process.
 9 However, Petitioner does not allege that he presented any of his claims to the California
 10 Supreme Court prior to filing this habeas action. See Petition at 3-9.

11 **DISCUSSION**

12 Prisoners in state custody who wish to challenge collaterally in federal habeas
 13 corpus proceedings either the fact or length of their confinement are first required to
 14 exhaust state judicial remedies, either on direct appeal or through collateral proceedings,
 15 by presenting the highest state court available with a fair opportunity to rule on the merits
 16 of each and every claim they seek to raise in federal court. 28 U.S.C. § 2254(b)-(c); see
 17 also O'Sullivan v Boerckel, 119 S.Ct 1728, 1730 (1999) (state's highest court must be
 18 given opportunity to rule on claims even if review is discretionary); Larche v Simons, 53
 19 F.3d 1068, 1071-72 (9th Cir. 1995) (Supreme Court of California must be given at least
 20 one opportunity to review state prisoners' federal claims). The exhaustion requirement
 21 applicable to federal habeas petitions is not satisfied if there is a pending post-conviction
 22 proceeding in state court. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir. 1983).
 23 If, for example, an appeal of a state criminal conviction is pending, a would-be federal
 24 habeas petitioner must await the outcome of his appeal before his state remedies are
 25 exhausted, even where the issue raised in the petition has been finally settled in the state
 26 courts. Id. Petitioner cannot present claims to this Court which he has not first raised in
 27 the highest state court available, the California Supreme Court, usually by filing a petition
 28

for review or a state habeas petition.

Here, Petitioner has not alleged that he presented his claims to the state supreme court prior to filing the instant habeas petition. Accordingly, the Court issues an Order to Show Cause to Petitioner as to why the petition should not be dismissed without prejudice to refiling once he has exhausted his claims with the state supreme court. Petitioner shall file a response within **thirty days** of the date of this order addressing: (1) whether he has an appeal, habeas petition or other post-conviction proceeding now pending before the state court; and (2) whether he has presented the claims in the instant petition to the California Supreme Court. Failure to file a timely response will result in the Court dismissing the instant petition without prejudice for failure to exhaust state court remedies.

CONCLUSION

1. Petitioner's request for extension of time to file his in forma pauperis application (docket no. 4) is GRANTED.

2. Petitioner's motions to proceed in forma pauperis (docket nos. 2, 5) are GRANTED.

3. The Court orders Petitioner to show cause why the instant petition should not be dismissed without prejudice to refiling once he has exhausted his claims with the state supreme court. Petitioner shall file a response within **thirty days** of the date of this order addressing: (1) whether he has an appeal, habeas petition or other post-conviction proceeding now pending before the state court; and (2) whether he has presented the claims in the instant petition to the California Supreme Court. **Failure to file a timely response will result in the Court dismissing the instant petition without prejudice for failure to exhaust state court remedies.**

4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court and all parties informed of any change of address by filing a separate paper captioned "Notice of Change of Address."

1 He must comply with the Court's orders in a timely fashion. Failure to do so may result
2 in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil
3 Procedure 41(b).

4 IT IS SO ORDERED.

5 DATED: 2/23/07



JEREMY FOGEL
United States District Judge

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1 A copy of this ruling was mailed to the following:

2 James Paul Gilmore, Jr.
3 P-46444
4 CA State Prison - Avenal
P.O. Box 9
Avenal, CA 93204

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Order Granting Request for Extension of Time; Granting Motions to Proceed in Forma Pauperis; Order to Show Cause Why Petition Should Not Be Dismissed for Failure to Exhaust State Remedies

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